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v.

KUNA SEGARAN MUNIANDY

COURT OF APPEAL, PUTRAJAYA

B

KN SEGARA JCA

SULONG MATJERAIE JCA

AZHAR MA'AH JCA

[CRIMINAL APPEAL NO: B-05-43 & 203-2010]

14 NOVEMBER 2011

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CRIMINAL PROCEDURE: *Appeal - Findings of fact by trial judge - Accused convicted and sentenced on reduced charge of possession under s. 39A(2) Dangerous Drugs Act 1952 - Whether trial judge misdirected on facts and law - Whether prima facie case of possession established - Whether prima facie case of mens rea possession proved*

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CRIMINAL PROCEDURE: *Statements - Accused's statement to police - Failure to administer caution - Whether statements made to police rendered inadmissible - Dangerous Drugs Act 1952, s. 37A(1)*

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Acting on information received, PW2 together with a police party arrived at house No. C4, Jalan Air Hitam, Batu 17 1/2 Puchong, Selangor. While checking the front gate which was locked, the accused came out of the house and when PW2 introduced himself as the police, the accused rushed back into the house. The police party climbed over the fence and gave chase and subsequently arrested the accused in room No. 2 of the house. Another man, Murugan, the tenant of the house, was also arrested. Room No. 2 was searched and the police party discovered cannabis, the total weight of which formed the subject matter of the first charge and 9.20 grammes of theophylline which formed the subject matter of the second charge. The police also arrested one Bhaskaran a/l Krishnan ('Bhaskaran') from the adjoining house. Both Murugan and Bhaskaran were not called to testify for the prosecution. The accused was charged with: (i) the offence of trafficking in 12,654.14 grammes of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') punishable under s. 39B(2); and (ii) the offence of possession of 9.20 grammes of theophylline under s. 9(3) of the Poisons Act 1952 ('PA 1952') punishable under s. 32(2) of the PA 1952. At the close of the prosecution's case, the first charge against the accused was reduced to one of

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- A possession punishable under s. 39A(2) of the DDA and the accused was acquitted and discharged on the second charge. Hence these appeals by the prosecution against the findings of the trial judge on the first charge that the prosecution had failed to establish a *prima facie* case of trafficking and by the accused against his conviction and sentence on the reduced first charge.

Held (dismissing the appeal by the prosecution and allowing the appeal by the accused)

Per KN Segara JCA delivering the judgment of the court:

- C (1) The prosecution had failed to establish a *prima facie* case of possession to warrant the trial judge to call upon the accused to enter his defence, either on a charge of trafficking or on a charge of possession of cannabis. The trial judge was correct in acquitting and discharging the accused on the second charge under the PA 1952 as the physical and mental elements for possession, on the factual matrix, were patently absent. (para 10)
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- E (2) There was no evidence that the accused was a sub-tenant of the house, or the exclusive occupier of any of the three rooms in the house, or had the exclusive use to any one of the three rooms. There was no evidence that the accused had a set of keys to the house for ingress and egress at will, without the permission of Murugan. (para 14)
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- G (3) Without the evidence of Murugan, the prosecution had failed in its duty to establish that the accused was the exclusive occupier of the room or he had exclusive use of the room in which the subject matter of the charges were found to attract any inference of possession by the accused. The evidence adduced by the prosecution wholly negated the exclusive use or occupation of the room by the accused to warrant any *prima facie* case of *mens rea* possession by the accused, actual or passive of the subject matter of the charges. (para 18)
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- I (4) There was no justification for any inference that the conduct of the accused at the time of his arrest, or immediately thereafter, established guilty knowledge of the subject matter of the charges and *mens rea* possession. Further, as no caution was administered to the accused under s. 37A(1) of the DDA at any time, statements made to the police by the accused

after his arrest (in room No. 2) incriminating the accused, was inadmissible in evidence. Such statements which were wrongly admitted as evidence should not be allowed to influence the trial judge in assessing a *prima facie* case. (para 27)

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Bahasa Malaysia Translation Of Headnotes

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Bertindak atas maklumat yang diterima, PW2 bersama dengan pasukan polis tiba di rumah No. C4, Jalan Air Hitam, Batu 17 1/2 Puchong, Selangor. Semasa memeriksa pintu pagar depan yang berkunci, tertuduh keluar dari rumah tersebut dan apabila PW2 memperkenalkan dirinya sebagai polis, tertuduh meluru masuk semula ke dalam rumah. Pasukan polis memanjat pagar tersebut dan mengejar dan kemudian menangkap tertuduh di bilik No. 2 rumah tersebut. Seorang lagi lelaki, Murugan, penyewa rumah tersebut, juga ditangkap. Carian dibuat di bilik No. 2 dan pasukan polis menemui kanabis, jumlah berat yang membentuk subjek perkara pertuduhan pertama dan 9.20 gram theophylline yang membentuk subjek perkara pertuduhan kedua. Pihak polis juga memberkas Bhaskaran a/l Krishnan ('Bhaskaran') daripada rumah bersebelahan. Kedua-dua Murugan dan Bhaskaran tidak dipanggil untuk memberi keterangan bagi pihak pendakwaan. Tertuduh dituduh dengan: (i) kesalahan mengedar 12,654.14 gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s. 39B(2); dan (ii) kesalahan milikan 9.20 gram theophylline di bawah s. 9(3) Akta Racun 1952 ('AR 1952') yang boleh dihukum di bawah s. 32(2) AR 1952. Di akhir kes pihak pendakwaan, pertuduhan pertama dikurangkan kepada milikan yang boleh dihukum di bawah s. 39A(2) ADB dan tertuduh dibebaskan dan dilepaskan daripada pertuduhan kedua. Maka rayuan-rayuan ini oleh pihak pendakwaan terhadap dapatan hakim perbicaraan atas pertuduhan pertama bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* pengedaran dan oleh tertuduh terhadap sabitan dan hukuman atas pertuduhan pertama yang dikurangkan.

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Diputuskan (menolak rayuan pihak pendakwaan dan membenarkan rayuan tertuduh)

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Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Pihak pendakwaan gagal membuktikan kes *prima facie* milikan untuk mewajarkan hakim perbicaraan untuk memanggil tertuduh membela diri, sama ada atas pertuduhan pengedaran atau atas pertuduhan milikan kanabis. Hakim bicara adalah

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- A betul dalam membebaskan dan melepaskan tertuduh atas pertuduhan kedua di bawah AR 1952 kerana unsur fizikal dan mental untuk milikan, atas matriks fakta, jelas tidak wujud.
- (2) Tidak ada keterangan bahawa tertuduh merupakan penyewa kecil rumah tersebut, atau penghuni eksklusif salah satu daripada tiga bilik di rumah tersebut, atau mempunyai penggunaan eksklusif mana-mana satu daripada tiga bilik tersebut. Tidak ada keterangan yang menunjukkan bahawa tertuduh mempunyai satu set kunci ke rumah tersebut untuk memasuki dan keluar sesuka hatinya, tanpa kebenaran Murugan.
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- (3) Tanpa keterangan Murugan, pihak pendakwaan telah gagal dalam kewajipannya untuk membuktikan bahawa tertuduh adalah penghuni eksklusif bilik tersebut atau mempunyai penggunaan eksklusif bilik tersebut di mana subjek perkara pertuduhan ditemui untuk menarik anggapan milikan oleh tertuduh. Keterangan yang dikemukakan oleh pihak pendakwaan secara keseluruhannya menolak penggunaan atau penghunian secara eksklusif bilik tersebut oleh tertuduh untuk mewajarkan dapatan kes *prima facie* milikan *mens rea* oleh tertuduh subjek perkara pertuduhan-pertuduhan tersebut sama ada sebenar atau pasif.
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- (4) Tidak ada apa-apa justifikasi bagi inferens bahawa tindakan tertuduh pada masa penangkapannya, atau sejurus selepas itu, membuktikan pengetahuan bersalah mengenai subjek perkara pertuduhan-pertuduhan tersebut dan milikan *mens rea*. Selanjutnya, oleh sebab tidak ada amaran diberikan kepada tertuduh di bawah s. 37A(1) ADB pada bila-bila masa, kenyataan yang dibuat kepada pihak polis oleh tertuduh selepas penangkapannya (di bilik No. 2) yang menunjukkan kebersalahan tertuduh, tidak boleh diterima sebagai keterangan. Kenyataan sedemikian yang dimasukkan secara salah sebagai keterangan tidak sepatutnya dibenarkan mempengaruhi hakim perbicaraan dalam menilai kes *prima facie*.
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Case(s) referred to:

Magendran Mohan v. PP [2011] 1 CLJ 805 FC (*refd*)

Legislation referred to:

- I Dangerous Drugs Act 1952, ss. 37A(1), 39A(2), 39B(1)(a), 39B(2)
Poisons Act 1952, ss. 9(3), 32(5)

For the accused - Karpal Singh (Ram Karpal with him); M/s Karpal Singh & Co A

For the prosecution - Kwan Li Sa DPP

[Appeal from High Court, Criminal Appeal No: 45-114-2006]

Reported by S Barathi

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JUDGMENT

KN Segara JCA:

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[1] The accused, Kuna Segaran a/l Muniandy, was charged in the High Court, Shah Alam, with two offences committed at the same time and place, on 17 May 2006, at about 11.30pm, at house No. C4, Jalan Air Hitam, Batu 17 1/2, Puchong, Selangor.

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[2] The first charge was for the offence of trafficking in 12,654.14 grammes of cannabis under s. 39B(1)(a) Dangerous Drugs Act 1952, punishable under s. 39B(2) of the same Act (DDA 1952).

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[3] The second charge was for the offence of possession of 9.20 grammes of theophylline under s. 9(3) of the Poisons Act 1952, and punishable under s. 32(2) of the same Act (PA 1952).

[4] At the close of the prosecution's case, the trial judge ruled, as to the first charge, that a *prima facie* case had been made against the accused for possession of 930.14 grammes of cannabis found in a black sling bag (P8) and reduced the first charge to one of possession punishable under s. 39A(2) DDA 1952, and called upon the accused to enter his defence on the reduced charge.

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[5] As to the second charge, the trial judge ruled that the prosecution had not made out a *prima facie* case against the accused and the accused was accordingly acquitted and discharged.

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[6] The accused claimed trial on the reduced first charge and gave evidence on oath. He did not call any witnesses. The trial judge found the accused guilty on the reduced charge and sentenced him to 12 years imprisonment, with effect from the date of his arrest, and to ten strokes of the rotan.

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- A [7] There are two appeals before us. The Public Prosecutor has appealed against the trial judge's finding on the first charge that at the close of the prosecution's case the prosecution had failed to establish a *prima facie* case of trafficking by the accused in 12,654 grammes of cannabis (Mahkamah Rayuan Appeal No: B-05-43-2010). There is no appeal by the Public Prosecutor on the accused's acquittal and discharge on the second charge at the close of the prosecution's case, without the accused being called upon to enter his defence.
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- C [8] The accused has appealed on his conviction and sentence on the first (reduced) charge (Mahkamah Rayuan Appeal No: B-05-203-10).
- D [9] We heard both appeals together. The appeal by the Public Prosecutor was dismissed and the appeal by the accused was allowed. The conviction and sentence by the trial judge was set aside.
- E [10] We were unanimous in our view, upon a careful review of the evidence adduced by the prosecution, that the prosecution had failed to establish a *prima facie* case of possession to warrant the trial judge to call upon the accused to enter his defence, either on a charge of trafficking or on a charge of possession of cannabis. The trial judge was most certainly correct in acquitting and discharging the accused on the second charge under the PA 1952 as the physical and mental elements for possession, on the factual matrix, were patently absent. As the factual matrix for the possession for the first charge was almost identical for possession in the second charge, we are of the view the trial judge has lapsed into a serious error in misdirecting herself on the critical analysis of the facts, upon a maximum evaluation of the prosecution's evidence, on the first charge.
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- H [11] It is well settled that the test at the end of the prosecution's case is "*prima facie* case" based on a maximum evaluation of evidence. The Federal Court reiterated this principle in our criminal jurisprudence in *Magendran Mohan v. PP* [2011] 1 CLJ 805, and went on to add:
- I The evidence has to be scrutinized properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a *prima facie* case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

- [12]** The charge sets out that the offences were committed at house No. C4, Jalan Air Hitam and not at any particular room of the house. There were three rooms in the house. The house had a perimeter fence and a padlocked gate in front. The accused was not jointly charged with any other person. **A**
- [13]** The evidence of the prosecution was unequivocal that the house was rented to one Muruga (Murugan) by the owner of the house, Sanif bin Mohammed (SP1). **B**
- [14]** There was no evidence that the accused was a sub-tenant of the house, or the exclusive occupier of any of the three rooms in the house, or had the exclusive use to any one of the three rooms. There was no evidence that the accused had a set of keys to the house for ingress and egress at will, without the permission of the tenant, Murugan. **C**
- [15]** The doors of the three rooms did not have any lock. The drugs and poison, the subject matter of the first and second charge, were found in one of the three rooms by the police on the night of the raid at the house. Three persons, including Murugan and the accused, were arrested in relation to the subject matter of the two charges on the night of the raid. Nothing, directly or indirectly, connecting the accused to the subject matter of the charges, was found in the same room where the subject matter of the charges was recovered. However, in that room there were two trousers and a shirt/jacket hanging on the wall, purportedly belonging to the accused, which were subsequently seized by the police. There was also a black sling bag hanging on the wall and a green bag on the floor which the police seized. There were numerous other items in that same room but the police neither established to whom the items belonged nor what exactly was the nature of the items. The police did not make an inventory of all the items that were in the room. That room was obviously not used as a bed room. **D**
- [16]** In law, Murugan, the tenant, was the occupier of the house No. C4. He has the care and management of the premises. Murugan, as occupier of the house, is *prima facie* deemed to have custody and control of the contents of all items within the house, from the date of the tenancy. He is deemed to have possession and knowledge of all the contents within the house until the contrary is established. In such circumstances, Murugan is an **E**
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- A extremely important witness in the unfolding of events with regard to the presence of the subject matter of the charges found in the room in question, especially when the prosecution has elected not to charge him in respect of the said incriminating items found in the room. The trial judge has failed to direct her mind to this issue
- B at the close of the prosecution's case and, in particular, to his responsibility and culpability as the sole tenant and occupier of the house having the care and management of the premises. This issue becomes even more critical because, when the investigating officer, SP7, was testifying, and upon being queried by the trial judge,
- C there is on record that the DPP had informed the court that Murugan would not be called as a witness. This must be further weighed and critically evaluated with the testimony of SP7 that Murugan was released from arrest because of the purported lack of evidence against him, and that he was to be made a witness
- D for the prosecution, instead. The record reads:

Mah: Atas pertanyaan Mahkamah Pn TPR memaklumkan Murgan tidak akan dipanggil sebagai saksi dan Mahkamah memutuskan semua keterangan Murugan di batalkan daripada rekod Mahkamah. Mahkamah benarkan Pn TPR

E untuk soal balik saksi atas perkara yang baru diputuskan itu untuk membetulkan rekod keterangan.

S: Adakah rakaman s. 112 diambil daripada Murugan semasa siasatan kamu?

F J: Ada, **setelah suspek dibebaskan dan saya rakam** s. 112 KTJ.

S: Apakah hasil siasatan kamu berkaitan dengan Murugan?

G J: Hasil siasatan saya setelah dirujuk kepada Timbalan Pendakwaraya Selangor disebabkan kekurangan bukti ke atas Murugan maka persetujuan TPR Murugan dibebaskan dan dijadikan saksi pendakwaan.
(emphasis added)

- H **[17]** This is not a case where the subject matter of the charges was found on the person of the accused, or in his apparel in the room, or in a bag belonging to him. This is not a case where the accused entered into the room and was found attempting to dispose off the subject matter of the charges, upon the police
- I raiding the premises. This was not a case where the accused was

running away to make an escape *via* the back door of the house, upon the arrival of the police from the front of the house. This was not a case where the accused was trying to prevent his arrest by struggling with the police. In fact, the trial judge appears to have made a finding of fact that the accused was not running away from the police but had gone into the house, from the open front door of the house, to get the key to open the locked gate to let the police in. She said in her grounds of judgment:

Di peringkat ini **mahkamah menerima inferens** yang mengikut pihak pembela menyebelahi OKT – **bahawa OKT lari masuk untuk mengambil kunci dan buka pintu pagar rumah yang masih terkunci sebelum polis boleh masuk.**
(emphasis added)

[18] Without the evidence of the tenant, Murugan, the prosecution has failed in its duty to establish that the accused was the exclusive occupier of the room or he had exclusive use of the room in which the subject matter of the charges were found, to attract any inference of possession by the accused. The evidence adduced by the prosecution wholly negates exclusive use or occupation of the room by the accused to warrant any *prima facie* case of *mens rea* possession by the accused, actual or passive, of the subject matter of the charges.

[19] Briefly, the salient facts of the case for the prosecution are as follows.

[20] On 17 May 2006, at about 10pm, C/Insp Munian a/l Muniandy (PW2), acting on information received, proceeded to house No. C4, Jalan Air Hitam, Batu 17 1/2 Puchong, Selangor, accompanied by a police party. On arrival at the scene at about 11.30pm, he gave instructions to his party to take up positions around the sides and back of the house. PW2, PW3 and three other members of his party took up positions in front of the house. While PW2 was checking the front gate, which was locked, he saw the accused coming out from the main door of the house. The accused was about 15 feet away from PW2, and when PW2 introduced himself as police, the accused rushed back into the house and went towards a room, marked as No. 2, in the sketch plan (exh. P5E). PW2 and his party climbed over the fence and chased after the accused. The accused was arrested in room No. 2. He was alleged to be in a state of panic and

- A** frightened. C/I Chay Hu Yeen (PW4), who had also rushed into the house chasing the accused, arrested another Indian man, Murgan a/l Murugaian (Murugan), in the living room which was adjacent to room No. 2. PW2 directed PW4 to bring Murugan into room No. 2 for examination. PW4 had ascertained that there
- B** was no other person in the house.

[21] PW2 conducted a search in room No. 2. He discovered a zipped green bag with the words “Top Star” (exh. P7) covered with a white cloth on the floor. PW2 unzipped the green bag and found:

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- (i) 13 compressed packages, each wrapped with tin foil and transparent plastic, confirmed to be 11724 grammes of cannabis.
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- (ii) In the pocket of the bag, there was another ten plastic packets containing whitish granular and powdery substance, which on subsequent chemical analysis were found to be 9.20 grammes of theophylline.
- E** PW2 found another black sling bag with the words “Base Ball (exh. P8) hanging on the wall of room No. 2. Inside the black sling bag PW2 found:
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- (iii) One compressed package, wrapped in tin foil and transparent plastic, confirmed to be 881 grammes of cannabis.
 - (iv) An orange plastic bag which contained loose dry leaves, which on subsequent analysis found to be 49.14 grammes of cannabis.
- G** **[22]** PW2 found a “Sansalon” shirt/jacket (exh. P17), a “Big Smith” trousers (exh. P18) and a “Louis” trousers (exh. P19) hanging at the place where the black sling bag (exh. P8) was discovered. The three items of clothing, namely, exhs. P17, P18 and P19, were alleged to belong to the accused. There was no
- H** incriminating drugs or poison found on the person of the accused or in exhs. P17, P18 and P19.

- I** **[23]** The total weight of the cannabis found in the green bag (exh. P7) and the black sling bag (exh. P8) formed the subject matter of the first charge, whereas the 9.20 grammes of theophylline in the ten plastic packets found in the green bag (exh. P7), formed the subject matter of the second charge.

[24] Upon information received from the accused by PW2, in the course of inspecting the black sling bag, PW4 arrested Bhaskaran a/l Krishnan (Appene) from the adjoining house. Just as Murugan was not called to testify for the prosecution, Appene, too, did not testify for the prosecution. **A**

[25] Before leaving the house for the police station with the three arrested persons and the exhibits seized, PW2 directed Murugan to lock the front door and the house gate. Murugan took the keys from the top of the television rack in the living room and complied with PW2's instructions and handed over the keys to the police. **B**
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[26] It is abundantly clear from the salient facts relied upon by the prosecution as set out above and, in particular:

- (i) three items of clothing (exhs. P17, P18 and P19) belonging to the accused were found hanging near the black sling bag (exh. P8) in room No. 2; **D**
- (ii) the accused rushed back into the house and went towards room No. 2 when PW2 identified himself as police from outside the locked gate; and **E**
- (iii) the accused was in a state of panic and frightened when he was arrested;

it would be manifestly unsafe to pin the accused with possession of the cannabis that was discovered by PW2 when: **F**

- (i) there was not an iota of evidence that the accused had hung the said black sling bag on the wall in room No. 2; and
- (ii) more importantly, there was nothing inside the black sling bag to positively connect the accused with custody and control of it, for example, his name was found embossed on the bag or some identification documents relating to the accused were retrieved by PW2 from inside the bag. **G**
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[27] We are of the view that there is no justification for any inference that the conduct of the accused at the time of his arrest, or immediately thereafter, establishes guilty knowledge of the subject matter of the charges and *mens rea* possession of same. In this regard, it has to be borne in mind that as no caution was **I**

A administered to the accused under s. 37A(1) DDA 1952 at any time, statements made to the police by the accused after his arrest (in room No. 2) incriminating the accused, is inadmissible in evidence. Such statements, which were wrongly admitted as evidence, should not be allowed to influence the trial judge in assessing a *prima facie* case.

C [28] In the above circumstances, the trial judge has seriously misdirected herself on the facts and the law of possession, when she only acquitted and discharged the accused on the second charge, but called upon him to enter his defence on an amended charge framed by the trial judge at the close of the prosecution's case.

D [29] We are unanimous in our view that the accused should have been acquitted and discharged on the first charge without his defence being called, on the same token he was acquitted and discharged on the second charge.

E [30] In the upshot, the conviction and sentence of the accused by the trial judge is set aside. The accused is, accordingly, acquitted and discharged.

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